LIBRARY
SUPREME COURT, U. S.

Office Supreme Court, U.S.
FILED
AUG 26 1969
JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1969.

NO. 517

JAMES F. LUMAN,

Petitioner,

vs.

HANS G. TANZLER, JR., ET AL., as and constituting the members of the Police Disciplinary Hearing Board of the City of Jacksonville, a municipal corporation,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

ROBERT P. SMITH, JR.
Counsel of record
JOHN A. DEVAULT, III
Counsel
1520 Barnett Bank Building
Jacksonville, Florida 32202
For Petitioner

BEDELL, BEDELL, DITTMAR & SMITH
1520 Barnett Bank Building
Jacksonville, Florida 32202
Of Counsel

٥

٦

INDEX

	Page
Citations to Opinions Below	2
Jurisdiction	2
Question Presented	2
Constitutional Provisions, State Statutes and Municipal Regulations Involved	2
Statement of the Case	5
Reason for Granting the Writ	8
Conclusion	14

Appendix

Opinion of the United States District Court for the Middle District of Florida - Permanent Injunction (Filed June 14, 1968)	1a
Opinions in the United States Court of Appeals for the Fifth Circuit:	
Opinion, 411 F.2d 164	3a
Opinion On Rehearing	10a

CITATIONS

CASES: *Page*

Blackburn v. *Alabama* (1960), 361 U.S. 199 11

Chambers v. *Florida* (1940), 309 U.S. 227 11

Gardner v. *Broderick* (1968), 392 U.S. 273 ..... 8, 9, 10

Garrity v. *New Jersey* (1967), 385 U.S. 493 ..... 10, 11, 12

Miranda v. *Arizona* (1966), 384 U.S. 436 10

People v. *Defore* (1926), 242 N.Y. 13, 150 N.E. 585 11

Simmons v. *United States* (1968), 390 U.S. 377 12

Uniformed Sanitation Men Association, Inc. v. *Commissioner of Sanitation* (1968), 392 U.S. 280 ..... 7, 8, 9, 10

CONSTITUTIONAL PROVISIONS:

U.S. Const., Amend. V 2

U.S. Const., Amend. XIV, §1 ..... 2, 3

STATUTES:

Chapt. 65-1747, §5, Laws of Florida 1965 ..... 3, 4

MISCELLANEOUS:

Rule 5.39, Rules and Regulations of the Jacksonville Police Department 4, 6, 7

Rule 5.49, Rules and Regulations of the Jacksonville Police Department 4, 5

In the
Supreme Court of the United States

OCTOBER TERM, 1969.

NO. _____

JAMES F. LUMAN,

Petitioner,

vs.

HANS G. TANZLER, JR., ET AL., as and constituting the members of the Police Disciplinary Hearing Board of the City of Jacksonville, a municipal corporation,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

James F. Luman, petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in appeal No. 26558 on April 22, 1969.*

---

*The members of the Police Disciplinary Hearing Board, appellants in the Court of Appeals and respondents here, are Hans G. Tanzler, Jr., Henry T. Broadstreet, R. R. Burroughs, H. George Carrison, R. Lavern Reynolds, John E. Santora, Jr., and Clyde W. Simpson, Jr.

Citations to Opinions Below

The opinion delivered by the United States District Court for the Middle District of Florida (R. 68-70; App. 1a-2a) in entering the permanent injunction is unreported. The opinion of the Court of Appeals (R. 76-84; App. 3a-9a) is reported in 411 F.2d 164. Both opinions are appended to this petition.

Jurisdiction

The judgment of the Court of Appeals was entered on April 22, 1969 (R. 86). Rehearing was denied on May 28, 1969 (R. 104; App. 10a). This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

Question Presented

Whether, as the Court of Appeals held, the Fourteenth Amendment forbids a municipality to discharge one of its policemen for refusing to answer questions pertaining to his conduct while on duty, and so relieves the policeman, who simultaneously is criminally prosecuted for the same alleged conduct, of the impermissible choice between discharge and self-incrimination.

Constitutional Provisions, State Statutes and Municipal Regulations Involved

This case involves the Fifth and Fourteenth Amendments to the United States Constitution, which provide in part:

> "No person . . . shall be compelled in any criminal case to be a witness against himself . . . ."
>
> U.S. Const., Amend. V.

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the

United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

U.S. Const., Amend. XIV, §1.

The laws of Florida applicable to the Jacksonville Police Department provide in part:

"No member of the police force, except the chief of police, who has served more than one year shall be removed from the police force without cause. Within ten days after receiving written notice from the chief of police of such removal, any member of the police force so removed, who has served more than one year, may request a public administrative hearing before a police review board hereby established to be known as the 'police disciplinary hearing board', composed of the members of the city commission, the president of the city council and the municipal judge, with the mayor-commissioner or, in his absence, the municipal judge presiding. If no such request is received in writing by the secretary of the city commission, who shall be the recorder for said board, within the time allowed herein, such right of hearing shall be deemed waived and the removal shall be final. Upon receipt of notice of such request for hearing the chief of police, with reasonable dispatch, shall prefer written charges with the police disciplinary hearing board stating the reasons for such removal and the secretary of the city commission shall promptly give such person so removed due notice of the charges and of the time and place of the hearing. On the hearing of a person so removed from the police force, the police disciplinary

hearing board may sustain such removal, or may reinstate such person as a member of the police force, with or without pay, demotion in rank, or suspension without pay, as it may deem just and proper."

Chapt. 65-1747, §5, Laws of Florida 1965.

Rule 5.39 of the Jacksonville Police Department, provides in relevant part that grounds for discharge of a policeman shall include:

"(m) Commission of a criminal act in violation of a State or Federal Statute.

. . .

"(x) Wilful refusal or failure to appear before any court, judge, prosecuting officer, board or body authorized to conduct any hearing or inquiry in any investigation for a violation of any of the statutes of this state when requested to do so; or having appeared, refusal to testify or answer any question concerning his conduct as a police officer or the performance of his duties on the grounds that his testimony or answers would tend to incriminate him; or refusal to waive immunity from prosecution on account of any matter about which he may be asked to testify at any such hearing or inquiry."

Rule 5.49 of the Jacksonville Police Department provides:

"The Chief of Police may suspend any member of the Department without pay against which a criminal information or indictment has been filed until disposition shall be made of such criminal charges, reporting such suspension forthwith to the Police Disciplinary

Hearing Board for approval or disapproval. In the case the Police Disciplinary Hearing Board shall approve such suspension, the member suspended shall be on enforced leave of absence without pay until disposition is made of the criminal charges against him, and he shall not be entitled to pay for such period of suspension regardless of the outcome of the criminal charges against him. The conviction of said member of such criminal charges shall be cause for his removal as a member of the Department without pay from the time of his suspension."

Statement of the Case

Petitioner, James F. Luman, a policeman of the City of Jacksonville for eleven years, has been suspended from the force without pay since December 8, 1967. Upon Luman's request for an administrative hearing and for restoration to the force, the chief of police charged Luman in writing, before the respondent police disciplinary hearing board, with "conduct prejudicial to the efficiency, good name and reputation of the department" as defined by departmental regulations. The specific charges were that Luman committed acts of larceny and burglary while on duty.

Soon after the administrative charges were lodged against Luman, the State of Florida charged him criminally and began prosecution for the same alleged offenses which were the subject of the administrative complaint. The criminal charges are still pending.

The respondent board thereupon notified Luman that, notwithstanding the pending criminal charges, it would immediately convene the prescribed evidentiary hearing to determine whether Luman should be restored to the force. But,

under the same regulations and the invariable practice of the respondent board, Luman could not and cannot be restored to the force and to his uniform, duties, salary and other perquisites unless and until the State criminal charges are disposed of favorably to him. And at the threatened hearing, Luman would be subject to Rule 5.39(x), under which an officer is subject to removal should he fail to appear at such a hearing or, having appeared, refuse to testify or answer questions concerning his conduct as a policeman "on the grounds that his testimony or answers would tend to incriminate him."

Thus, although the threatened hearing could not result in his restoration to the force, Luman was required to attend respondents' hearing and there testify concerning his conduct as a policeman, which is the subject matter of the State's criminal charges, pending in a court of record.

Being unable and unwilling to guess whether the consequences of testifying at the threatened hearing would be self-incrimination in the State court and whether the consequence of refusing to testify would be his final discharge from the force, Luman, who feared the consequences in either event, complained to the District Court. He asserted that, until a disposition of the State criminal charges is had, the threatened administrative hearing constitutes a threatened deprivation of constitutionally protected rights. Luman therefore prayed that the respondent board be enjoined from holding the hearing until such time as the criminal charges are disposed of, so that, if Luman is acquitted by the State, the administrative hearing could result in his restoration to the force.

The respondent board admitted the factual averments of Luman's complaint, including Luman's claim that the threatened hearing could not then, for the reasons stated, result in his restoration to the force.

The District Court temporarily and then permanently enjoined respondents from conducting the hearing until after trial and disposition of the State criminal charges, ruling that no public interest for the hearing had been shown or suggested and that, in the circumstances, to conduct a hearing would be to subject Luman to impermissible coercion in his constitutionally secured free choice to testify or not.

Respondents appealed to the Court of Appeals for the Fifth Circuit, which read this Court's decision in *Uniformed Sanitation Men Association, Inc.* v. *Commissioner of Sanitation* (1968), 392 U.S. 280, as condemning Rule 5.39(x) as constitutionally invalid. The Court ruled therefore that Luman does not face the Hobson's choice which he alleged and which the District Court found because, although respondents "may conduct a hearing within the confines of the charges against Luman which relate to the performance of his official duties" (App. 9a), Luman is "forearmed with the fact that he *cannot be discharged for refusing to testify*" (App. 8a-9a, emphasis added.) The Court ruled flatly that "Rule 5.39(x) cannot be applied against Luman" (App. 9a). Petition for rehearing was denied.

Reason for Granting the Writ

The writ should be granted because the decision of the Court of Appeals (App. 9a), that a public employee "cannot be discharged for refusing to testify" administratively respecting his official conduct, decides a question of federal constitutional law in a way in conflict with applicable decisions of this Court.

The Court of Appeals reversed because, it said, *Uniformed Sanitation Men Association, Inc.* v. *Commissioner of Sanitation* (1968), 392 U.S. 280, holds that an employee fearing self-incrimination "cannot be discharged for refusing to testity" in an administrative hearing (App. 9a). The cited decision of this Court does not so hold. It holds rather that an employee cannot be discharged for refusing to waive the statutory immunity that will result from his testimony. The decision sought to be reviewed not only departs from and conflicts with this Court's decision in *Uniformed Sanitation Men* but is also in direct conflict with this Court's decision in *Gardner* v. *Broderick* (1968), 392 U.S. 273:

> "If appellant, a policeman, had refused to answer questions specifically, directly, and narrowly relating to the performance of his official duties, without being required to waive his immunity with respect to the use of his answers or the fruits thereof in a criminal prosecution of himself, Garrity v. State of New Jersey, supra, the privilege against self-incrimination would not have been a bar to his dismissal."
>
> 392 U.S. at 278.

In *Uniformed Sanitation Men* three city employees were discharged for refusing to sign waivers of immunity when summoned before a grand jury, and twelve additional em-

ployees were discharged for refusal to answer questions by the Commissioner of Investigation of the City of New York when told that their answers could be used against them in subsequent proceedings. Holding that their discharge was improper, this Court stated:

> "Petitioners were not discharged merely for refusal to account for their conduct as employees of the city. They were dismissed for invoking and refusing to waive their constitutional right against self-incrimination.
>
> . . .
>
> "As we stated in Gardner v. Broderick, supra, if New York had demanded that petitioners answer questions specifically, directly, and narrowly relating to the performance of their official duties on pain of dismissal from public employment without requiring relinquishment of the benefits of the constitutional privilege, and if they had refused to do so, this case would be entirely different. In such a case, the employee's right to immunity as a result of his compelled testimony would not be at stake . . . petitioners, being public employees, subject themselves to dismissal if they refuse to account for their performance of their public trust, after proper proceedings, which do not involve an attempt to coerce them to relinquish their constitutional rights."
>
> 392 U.S. at 283-85.

Similarly, in *Gardner* this Court held that a police officer was improperly "discharged from office not for failure to

answer relevant questions about his official duties, but for refusal to waive a constitutional right." 392 U.S. at 278.

Thus, the holding of the Court of Appeals, that by their construction of *Uniformed Sanitation Men* "Luman is forearmed with the fact that he cannot be discharged for refusing to testify," is in direct conflict with both that decision and the decision in *Gardner*.

The decision of the Court of Appeals deprives local government of essential powers which heretofore were thought to be constitutional in their exercise. For reasons best known to them, respondents do not complain of the decision. But the decision of the Court of Appeeals also has serious consequences for Luman. For while it seemingly alleviates the coercion that will attend the threatened hearing by freeing Luman from testifying, the decision in fact renders voluntary,* and hence admissible in the criminal trial, any testimony that Luman may feel bound to give to protect his job. Thus, far from relieving Luman's perplexity, as apparently was its intention, the Court of Appeals has compounded it.

The importance of this case as precedent is that the moment of coercion has not yet come. Ordinarily, federal courts have only to decide whether there was coercion at some past moment and then to determine what remedy is required to obliterate the consequences of that coercion. Powerless to recall and undo coercion once applied, the usual judicial function is to deprive the State of the fruits of coercion. Certainly, in the structure of the federal judiciary, that has been this Court's function. *See, e.g., Garrity* v. *New Jersey* (1967), 385 U.S. 493; *Miranda* v. *Arizona* (1966), 384

---

*Garrity v. New Jersey (1967), 385 U.S. 493, 499.

U.S. 436; *Blackburn* v. *Alabama* (1960), 361 U.S. 199; *Chambers* v. *Florida* (1940), 309 U.S. 227. This concentration on reparations as remedy is almost inevitable, but its result is frequently that "[t]he criminal is to go free because the constable has blundered." *People* v. *Defore* (1926), 242 N.Y. 13, 21, 150 N.E. 585, 587 (Cardozo, J.).

District Judge McRae recognized, though the Court of Appeals evidently did not, that the Constitution first forbids the coercion before it forbids the use of its fruits. In *Garrity* v. *New Jersey* (1967), 385 U.S. 493, this Court held that testimony gained from police officers on "the fear of being discharged . . . for refusal to answer on the one hand and the fear of self-incrimination on the other was 'a choice between the rock and the whirlpool' which made the statements products of coercion in violation of the Fourteenth Amendment." 385 U.S. at 496. The Court held that the Constitution prohibited the coercion which produced the statements, and therefore reversed convictions obtained by the use of the statements:

> "The choice given petitioners was either to forfeit their jobs or to incriminate themselves. The option to lose their means of livelihood or to pay the penalty of self-incrimination is the antithesis of free choice to speak out or to remain silent. That practice, like interrogation practices we reviewed in Miranda v. State of Arizona, 384 U.S. 436, 464-465, 86 S.Ct. 1602, 1623, 16 L.Ed.2d 694, is 'likely to exert such pressure upon an individual as to disable him from making a free and rational choice.'"
>
> 385 U.S. at 497.

There is no doubt but that, as the District Court found (App. 2a), the threatened hearing would coerce Luman in

the exercise of his constitutional rights respecting self-incrimination. The Court of Appeals undertook to alleviate that coercion, by assuring Luman that he may with impunity withhold his testimony. That advice resulted in an erroneous decision conflicting with all that this Court has recently said on the subject. And so, coercion is still threatened.

This Court has variously accommodated, depending on circumstances, the "undeniable tension" [*Simmons* v. *United States* (1968), 390 U.S. 377, 394] between individual needs for freedom from coercion in the enjoyment of constitutional immunities and society's need to protect "other important public values" [Mr. Justice Harlan for the dissenters in *Garrity*, 385 U.S. 493, 501.] The District Court found in this case that there is no "important public value" to be served by the threatened administrative hearing, in advance of disposition of the criminal charges (App. 2a).

The District Court's finding was surely correct. An immediate hearing is not necessary to separate Luman from his duties as a policeman, from his uniform, from the payroll and from other benefits that Luman enjoyed as an officer. Luman has already been removed from the force and he remains a public officer only in the sense that his removal is not yet final and he may yet be restored, if he is acquitted of the State criminal charges and if, on a proper administrative hearing, he is likewise acquitted. But a hearing now cannot result in his restoration. (See respondents' Answer, R. 36).

Thus, as the District Court held (App. 2a), no public interest would be served by an immediate hearing. The Court of Appeals stated in its opinion that:

> "Defendants, on the other hand, urge that the matter of Luman's suspension should be settled one way or the other in the public interest of keeping the police force at full strength. Until the question is settled, they argue, they are not at liberty to replace Luman although he has been removed from the force."
>
> App. 6a.

As the Court of Appeals indicated, this was pure "argument." Even as argument, it was never advanced in the District Court. There is, therefore, no evidence that the City is "not at liberty to replace Luman" or that "replacing" him is a critical step in "keeping the police force at full strength." More fundamentally, however, it is evident that an immediate hearing cannot "settle" the matter "one way or the other" but only "one way," by sustaining his removal.

In these circumstances, as the District Court held, the restoration hearing "presumably for the benefit of the accused" (App. 2a) cannot serve its purpose and will result only in imposing on Luman an "impermissible" choice.

Conclusion

The writ should be granted to review a decision of a Court of Appeals which is demonstrably in conflict with this Court's prior decisions and to reaffirm that, in the absence of real public values to be served by such action, the Constitution forbids that the City coerce an employee in the free exercise of his constitutionally-secured rights.

Respectfully submitted,

ROBERT P. SMITH, JR.
Counsel of record

JOHN A. DEVAULT, III
Counsel
1520 Barnett Bank Building
Jacksonville, Florida 32202

For petitioner.

BEDELL, BEDELL, DITTMAR & SMITH
1520 Barnett Bank Building
Jacksonville, Florida 32202

Of counsel.

APPENDIX

APPENDIX

OPINION OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA

PERMANENT INJUNCTION

(June 14, 1968)

After due notice, this cause came on for hearing before this Court on June 13, 1968.

As the result of the stipulation entered into between the parties, there are no factual issues to be tried. Plaintiff's application is for a preliminary or permanent injunction pursuant to Rule 65(a)(2) of the Federal Rules of Civil Procedure. This Court has jurisdiction of the parties and of the claim for relief. 42 U.S.C. § 1983, 28 U.S.C. §1343.

It is apparent from the stipulated facts that defendants, officials of the City of Jacksonville, and in their respective capacities as members of the Police Disciplinary Hearing Board, acting under color of State law, will, unless restrained, hold an immediate public hearing to inquire into and make findings with respect to the charges of criminal and other misconduct made against plaintiff by the Chief of Police of the City of Jacksonville as grounds for plaintiff's suspension or removal from the force on December 8, 1967.

It is clear that such a hearing would deprive plaintiff of certain rights secured to him by the fourteenth amendment of the United States Constitution.

If plaintiff were to appear before the Board, any testimony he might give could be used against him in the State criminal case now pending, either as evidence or as a means of

obtaining evidence. If plaintiff should fail to appear, or refuse to testify, he could be dismissed pursuant to Rule 5.39(x) of the Jacksonville Police Department. Such a choice is impermissible under the Constitution of the United States. See *Garrity v. New Jersey*, 385 U.S. 493 (1967), *Spevack v. Klein*, 385 U.S. 511 (1967), *Uniformed Sanitation Men Ass'n., Inc., v. Comm'r. of Sanitation of City of New York*, 36 U.S.L. Week 4534 (U.S. June 10, 1968), *Gardner v. Broderick*, 36 U.S.L. Week 4536 (U.S. June 10, 1968). In any event, the Board, at a hearing presumably for the benefit of the accused, cannot reinstate plaintiff so long as the criminal charges are pending. This Court cannot envision any public interest that would be served by having a hearing prior to the disposition of those charges.

Therefore, it is

ORDERED:

1. Defendants are hereby permanently restrained and enjoined from hearing and determining the matter of the pending charges made against plaintiff, James F. Luman, by the Chief of Police of the City of Jacksonville until the criminal charges now pending against plaintiff in the Criminal Court of Record of Duval County are disposed of.

2. Plaintiff is released from the bond filed to effectuate the Temporary Restraining Order heretofore entered, and the Clerk is directed to return to plaintiff or to his attorneys the cash deposit made in lieu of surety bond.

DONE AND ORDERED at Jacksonville, Florida, this 14th day of June, 1968.

/s/ Wm. A. McRae, Jr.

Judge

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

(Rendered April 22, 1969)
Before PHILLIPS*, BELL, and
MORGAN, Circuit Judges.

BELL, Circuit Judge: Defendants-appellants are members of the Police Disciplinary Hearing Board of the City of Jacksonville, Florida. Luman is a Jacksonville policeman who was suspended from the force by the Chief of Police for conduct allegedly "prejudicial to the efficiency, good name and reputation of the Jacksonville Police Department." Thereafter state criminal charges were filed against him. Defendants then proposed to hold an administrative hearing on the charges of the Chief of Police. Luman sought to have the hearing continued in view of the pendency of the state charges which admittedly arose out of the same activity that gave rise to his suspension by the Chief of Police. The continuance was denied.

Luman then sought a federal injunction, on a privilege against self-incrimination Fifth Amendment basis, to restrain the holding of such a hearing until after disposition of the state criminal charges. The district court granted a permanent injunction and this appeal followed.

In issuing the injunction, the district court said:

> "If plaintiff were to appear before the Board, any testimony he might give could be used against him in the State criminal case now pending, either as evidence or as a means of obtaining evidence. If plaintiff should fail to appear, or refuse to testify, he could

*Of the Tenth Circuit, sitting by designation.

> be dismissed pursuant to Rule 5.39(x) of the Jacksonville Police Department. Such a choice is impermissible under the Constitution of the United States. See *Garrity v. New Jersey*, 385 U.S. 493 (1967), *Spevack v. Klein*, 385 U.S. 511 (1967), *Uniformed Sanitation Men Ass'n, Inc. v. Comm'r of Sanitation of City of New York*, 36 U.S.L. Week 4534 (U.S. June 10, 1968), *Gardner v. Broderick*, 36 U.S.L. Week 4536 (U.S. June 10, 1968). In any event, the Board, at a hearing presumably for the benefit of the accused, cannot reinstate plaintiff so long as the criminal charges are pending. This Court cannot envision any public interest that would be served by having a hearing prior to the disposition of those charges."

The court thus saw Rule 5.39(x) as placing Luman in a constitutionally impermissible dilemma such as to require an injunction. The court also gave weight to the lack of public interest in having a hearing. We are constrained to the view that the injunction was not due.

The Rule and Regulations governing the Jacksonville Police Department define "conduct prejudicial to the efficiency, good name and reputation of the department" to include the following:

> 5.39(m) - Commission of a Criminal Act in violation of a State or Federal Statute.
>
> . . . . .
>
> 5.39(x) - Wilful refusal or failure to appear before any Court, judge, prosecuting officer, board or body authorized to conduct any hearing or inquiry in any investigation for a violation of any of the statutes of this state when requested to do so; or, having appeared, refusal to

> testify or answer any question concerning his conduct as a police officer or the performance of his duties on the grounds that his testimony or answers would tend to incriminate him; or refusal to waive immunity from prosecution on account of any matter about which he may be asked to testify at any such hearing or inquiry.

The sequence of pertinent events are as follow. Luman was suspended from the police force on December 8, 1967. He timely requested a hearing before the Police Disciplinary Board. On December 29, 1967 and February 9, 1968, after Luman had requested a hearing, the Chief of Police filed two sets of written charges against him. On March 7, 1968, the State of Florida filed a nine count criminal information against him. The criminal charges involved allegations of larceny, burglary, and conspiracy. As stated, it is agreed that the criminal charges arise out of the same activities as gave rise to Luman's removal from the police force. After the state criminal charges were filed, defendants notified Luman to appear for a hearing. It was then that he sought a continuance of the hearing until disposition of the criminal charges by the state.

It is undisputed that the administrative hearing will be of no avail to Luman until there has been a disposition of the state charges. This follows from the answer of defendants that: "Plaintiff cannot possibly be restored to duty and reinstated as a member of the Jacksonville Police Department, as a result of a hearing to be held June 5, 1968 [the proposed hearing date], or at any other time before the trial and disposition of the criminal charges pending against him." This fact is the basis for Luman's point, in addition to his privilege against self-incrimination argument, that no useful purpose

could be served by a hearing and that the public interest would not suffer from a continuance. Defendants, on the other hand, urge that the matter of Luman's suspension should be settled one way or the other in the public interest of keeping the police force at full strength. Until the question is settled, they argue, they are not at liberty to replace Luman although he has been removed from the force.

Luman's position is that defendants seek to put him on terms with respect to his Fifth Amendment privilege against self-incrimination.[1] He urges that they offer him only the choices of risking the forfeiture of his job for failure to comply with Rule 5.39(x), or the possibility of self-incrimination if he does comply.

As we read the Supreme Court opinions in this area, *Garrity v. New Jersey*, 1967, 385 U.S. 493, 87 S.Ct. 616, 17 L.Ed. 2d 562; *Gardner v. Broderick*, 1968, ... U.S. ....., 88 S.Ct. ....., 20 L.Ed.2d 1082; and *Uniformed Sanitation Men v. Comm. of Sanitation*, 1968, ... U.S. ....., 88 S.Ct. ....., 20 L.Ed.2d 1089, the choices faced by Luman do not run afoul of his asserted constitutional right. The first phase of the problem was answered in the context of testimony coerced by a rule similar to Rule 5.39(x) at an administrative hearing, with the testimony given being used later against the employee in a criminal trial. This was the situation in *Garrity v. New Jersey* where the Supreme Court said:

> "We now hold the protection of the individual under the Fourteenth Amendment against coerced statements prohibits use in subsequent criminal proceedings of statements obtained under threat of removal

[1]Applicable against appellant city officials under the Fourteenth Amendment since *Malloy v. Hogan*, 1964, 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed.2d 653.

> from office, and that it extends to all, whether they are policemen or other members of our body politic." 385 U.S. at p. 500.

The issue in *Garrity* was the scope of the privilege against self-incrimination. The court approached the problem by posing the question ". . . whether the accused was deprived of his free choice to admit, to deny, or to refuse to answer." 380 U.S. at p. 496. Concluding that he was depriced of his free choice by the impact of the forfeiture of employment rule, the statements were held inadmissible in the subsequent criminal proceedings.

This, however, left unanswered the other side of the question: whether a rule such as Rule 5.39(x) could be validly used in the first place to provide such coercion. The answer, in the negative, came in the *Gardner*, and *Uniformed Sanitation Men* cases, supra.

In Gardner, the court said: ". . . the mandate of the great privilege against self-incrimination does not tolerate the attempt, regardless of its ultimate effectiveness, to coerce a waiver of the immunity it confers on penalty of the loss of employment." *Gardner* involved a grand jury investigation of criminal activities involving policemen, rather than an administrative hearing. Also, the state had an immunity statute which conferred immunity on Gardner, which he was asked to waive on threat of discharge. The *Gardner* court, however, spoke to the situation of the administrative hearing:

> "If appellant, a policeman, had refused to answer questions specifically, directly, and narrowly relating to the performance of his official duties, without being required to waive his immunity with respect to the use of his answers or the fruits thereof in a crimi-

nal prosecution of himself, *Garrity v. New Jersey*, supra, the privilege against self-incrimination would not have been a bar to his dismissal."

In the *Uniformed Sanitation Men* case, the court held that the city sanitation employees could not be put to the choice under a rule quite like Rule 5.39(x),[2] between surrendering their constitutional rights or their jobs. Fifteen men were involved. Three were asked to sign waivers of immunity before the grand jury and were thus in the same category as the policeman in *Gardner*. Twelve were discharged for refusing to testify at a city administrative hearing, asserting their privilege against self-incrimination. The court concluded that they were wrongfully dismissed.

The question for this court then is how stands Luman in light of these authorities? There is no contention that defendants could grant him immunity from state prosecution. Cf. the Florida statute on immunity as it relates to courts, FSA, § 939.29. Thus we do not have a precise *Gardner* case. We do, however, have a *Uniformed Sanitation Men* case, and under its rationale, Luman is forearmed with the fact that

---

[2]Section 1123 of the New York City Charter provides:

"If any councilman or employee of the city shall, after lawful notice or process, wilfully refuse or fail to appear before any court or judge, any legislative committee, or any officer, board or body authorized to conduct any hearing or inquiry, or having appeared shall refuse to testify or to answer any question regarding the property, government or affairs of the city or of any county included within its territorial limits, or regarding the nomination, election, appointment or official conduct of any officer or employee of the city or of any such county, or the ground that his answer would tend to incriminate him, or shall refuse to waive immunity from prosecution on account of any such matter in relation to which he may be asked to testify upon any such hearing or inquiry, his term or tenure of office or employment shall be vacant, and he shall not be eligible to election or appointment to any office or employment under the city or any agency."

he cannot be discharged for refusing to testify. He no longer faces the choice of self-incrimination or job forfeiture under Rule 5.39(x).

In sum, the present posture of the law, as we understand it, leaves the parties in this position. Rule 5.39(x) cannot be applied against Luman. At the administrative hearing he will have a "free choice to admit, to deny, or to refuse to answer."[3] This is full vindication of the Fifth Amendment privilege against self-incrimination. On the other hand, defendants may conduct a hearing within the confines of the charges against Luman which relate to the performance of his official duties.

Lastly, we must consider Luman's position that we need not try to unravel the decisional threads of the *Garrity*, *Gardner*, and *Uniformed Sanitation Men* cases. He argues that because the City of Jacksonville has not shown that important public values would be frustrated by the injunction, the injunction should be continued and the district court affirmed. This, however, misconceives the burden of justification in this area and ignores important institutional interests inherent in the federal system. The injunction must be grounded on a violation of federal constitutional or statutory rights. Here there are no such grounds.

REVERSED and REMANDED with direction that the injunction be dissolved.

---

[3]In the absence of an immunity statute, we are not faced with the question of the right of a city to discharge an employee who refuses to answer. Cf. *Gardner v. Broderick*, ------ U.S. at p. -------. [36 L.W. at 4537].

OPINION OF COURT OF APPEALS UPON DENYING REHEARING

(May 28, 1969)

ON PETITION FOR REHEARING

Before PHILLIPS*, BELL, and MORGAN, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED. It is further ordered that costs of appeal shall be borne by each party as incurred.

*Judge Phillips of the Tenth Circuit, sitting by designation.